173 (4)

No. 10-281

In The
Supreme Court of the United States

JEROME K. LANNING, et al.,

Petitioners,

vs.

PATRICK PILCHER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Florida First District Court Of Appeal

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER ARTICLE VII. SECTION 4(c), FLORIDA CONSTITUTION, KNOWN AS THE FLORIDA "SAVE-OUR-HOMES" AMENDMENT, ADOPTED EFFECTIVE IN 1995, VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE 14TH AMENDMENT, THE PRIVILEGES AND IMMUNITIES CLAUSE, ARTICLE IV, SECTION 2, UNITED STATES CONSTITUTION, THE DORMANT COMMERCE CLAUSE, ARTICLE I, SECTION 8, CLAUSE 4, UNITED STATES CONSTITUTION, OR THE RIGHT TO TRAVEL BETWEEN STATES.

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JURISDICTION

Petitioners argue that this Court should take jurisdiction of this case because the Florida Courts decided an important question of federal law not previously settled by this Court, and because the Florida Court decided an important federal question in a way that conflicts with relevant decisions of this Court.

Respondents Patrick Pilcher, Walton County Property Appraiser (Pilcher) and Rhonda Skipper, Walton County Tax Collector (Skipper), respectfully submit that neither statement is correct. The decision of the Florida Courts is consistent with established precedent of this Court. The fundamental premise underlying the court's decision in *Lanning v. Pilcher*, 16 So.3d 294 (Fla. 1st DCA 2009), *review denied*, 37 So.3d 847 (Fla. 2010), is the same premise underlying *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), and most of the Petitioners' contentions were rejected in *Nordlinger*.

The trial court, in an exhaustive opinion, addressed each contention made citing case authority for each. (Petitioners' Appendix B) Both the trial court and the First District Court of Appeal relied on *Nordlinger* and *Reinish v. Clark*, 765 So.2d 197 (Fla. 1st DCA 2000), *review denied*, 790 So.2d 1107 (Fla. 2001), *cert. denied*, 534 U.S. 993, 122 S.Ct. 458 (2001). *Reinish* involved a challenge to Florida's constitutional homestead tax exemption, which had been part of the Florida Constitution since 1934. *Lanning* merely extended virtually the same challenge to the amendment

to the Florida Constitution in Article VII, Section 4, which added thereto what is commonly called the "Save-Our-Homes Amendment" (SOHA) in (c) effective in 1995, to limit annual increases in the valuation of homesteads to no more than 3 percent more than the prior year's value. Like the original homestead tax exemption of $25,000 per homestead, the SOHA protects property used as a homestead from the high increases in property values resulting from the real estate boom experienced in Florida continuing through 2005, when the present economy starting driving values down. *Nordlinger* addressed a similar enactment to property owned by California residents, although not limited to homestead residential property, and this Court upheld the enactment addressing virtually the same contentions made by the Petitioners at bar. The decision in *Lanning* is consistent with the pronouncements in *Nordlinger*, and adds nothing new to tax jurisprudence as the Petitioners contend.

In their brief, Petitioners state that "there is a profound disagreement among the states as to the meaning of 'discrimination' in the context of similar state taxation laws." (Petitioners' brief at 2) Thereafter, the petitioners state that the disagreement "centers on the degree to which facially equal treatment between non-residents and a particular class of residents can be used" and assert their self-serving conclusion of constitutional infirmity relating to the interstate commerce clause. (*Id.*) Petitioners also

suggest that the holding in *Lanning* affects the national housing market. (Petitioners' brief at 2)

Respondents Pilcher and Skipper disagree that there is any "profound disagreement" among the states as the Petitioners contend, and the Petitioners do not specify even one instance of any such disagreement. In its brief, the Petitioners presumably are obliquely addressing the undisputed fact in this case that non-resident residential property owners of second or vacation properties in Florida, and Florida residents owning a homestead property and a second or vacation residential property are treated the same insofar as ad valorem taxation on the second or vacation residences are involved. *Lanning* and *Reinish* both recognized that it is the *use* made of the residential property that determines its taxable status. If the property is *used* as the permanent homestead, it is entitled to the special tax treatment; if not used as the permanent homestead, then it is not.

With rising property values, Florida had a perfect right to protect its citizens. Florida is well known as a retirement state where many people live on fixed incomes, and many Florida citizens have lived in their homes for decades or more. Florida's tax structure prevents many of those residents from becoming victims of higher taxes causing them to be unable to continue to reside in their homes. The SOHA protects the property *used* as homestead from rapidly accelerating tax increases. In short, these Florida residents do not have to fear loss of their homes because the

values and taxes have risen to the point that they no longer can afford to live there.

Petitioners repeat an argument made throughout, which was never factually supported in the trial court as the trial court noted, that the SOHA financially disincentivized non-residents to become Florida residents. This contention is glaringly specious when the present economic situation is reviewed with its resulting plummeting real property values.

The statement of the Petitioners at page 3 of its brief that the class of residential owners exists and fixing one class as those who reside in Florida more than 6 months is not correct. In Florida, *all* property is assessed as of January 1, not based on any durational residency. *See* § 192.042, Fla. Stat. (2010). The class distinction is based on residential property use, owned by persons properly qualified to receive and receiving homestead status, and those owning non-homestead residences. If a person owns a vacation residence, to vacation in or rent seasonally, that property is treated differently tax wise because it is not used as a homestead. Florida and other states try to protect their citizens and homeowners and that is a legislative state goal. Protecting homeowners and the local community's stability and preservation have always been legitimate state goals in formulating state tax structure. *See Nordlinger*.

STATEMENT OF THE CASE

This case involves a challenge to Article VII, Section 4(c), Florida Constitution, referred to as the Save-Our-Homes Amendment (SOHA), and section 193.155, Florida Statutes (1995), the implementing statute. The amendment provides for a cap on values of Florida homestead property so that the value cannot exceed three percent (3%) each year over the value in the prior year. The tax benefit is limited to property *used* as a homestead based solely on the use of the property, not the status of the owner as a Florida or non-Florida resident.

This case commenced with the filing of a complaint by the Petitioners in circuit court in and for Leon County, Florida, challenging the SOHA, which is a voter-approved amendment via ballot initiative adding Article VII, Section 4(c) to the Florida Constitution. Subsequently, the Petitioners filed an amended complaint (Petitioners' Appendix F) and the matter was set for final hearing after a Second Amended Complaint was filed. The Petitioners challenged the SOHA on the grounds that it "violated the due process and equal protection guarantees set out in the Fifth Amendment of the United States Constitution and incorporated against the states by the Fourteenth Amendment, the Privileges and Immunities clause of Article Four and the Fourteenth Amendment of the Constitution, the right to travel, and the Interstate Commerce Clause set forth in Article I, § 8 of the Constitution." (Petitioners' Appendix F at 62)

The Respondents all responded to the amended complaints by filing motions to dismiss on the grounds that the contents and allegations of the amended complaint failed to state a cause of action under both Florida and federal law, in that all of the contentions had been rejected by previous Florida and federal case precedent.

The trial court after extensive hearing and briefs, granted the Respondents' motions to dismiss addressing each contention made by the Petitioners. (Petitioners' Appendix B) The Petitioners timely appealed to the First District Court of Appeal, which, after oral argument, upheld the trial court's decision. (Petitioners' Appendix A) Petitioners then sought review in the Florida Supreme Court, which declined to accept jurisdiction on May 26, 2010. (Petitioners' Appendix C) Thereafter, the Petitioners filed the instant petition for writ of certiorari to this Court asserting jurisdiction.

STATEMENT OF THE FACTS

The Petitioners are Alabama residents who own property in Florida, and they do not receive homestead tax exemption in Florida. (Petitioners' Appendix F at 67) The Respondents are various public entities and officials in Florida consisting of two Florida counties, two district school boards, two county property appraisers, two county tax collectors, one city, and the Executive Director of the Florida Department of Revenue. (Petitioners' Appendix F at

69-71) None of the Petitioners receive the benefit of the SOHA, which applies only to property being used as a permanent residence and receiving homestead tax exemption as authorized in Article VII, Section 6, Florida Constitution. Petitioners challenge the SOHA and its implementing statute, section 193.155, because non-residents who own residential properties are not entitled to receive the protections of the SOHA on the value of residential property they own in Florida.

The operational effect of the SOHA is that residential property which qualifies as homestead property by being the permanent home of the owner, pursuant to sections 196.011 and 196.031, Florida Statutes (2010), receives the benefit of not increasing in value from year to year in excess of three percent (3%) or the consumer price index, whichever is lower. It is the use of the property that determines its entitlement to the SOHA under Florida law, so residents and non-residents owning residential second or vacation homes are treated the same and neither qualifies to receive the SOHA benefit.

REASONS FOR DENYING THE PETITION

Petitioners' framing of the question is replete with unsupported descriptive comments and should be disregarded. The question as framed herein should be answered in the negative and jurisdiction declined. The decision in *Lanning* is squarely consistent

with *Nordlinger*, and other decisions of this Court, and virtually all of the Petitioners' contentions were adversely resolved in *Nordlinger*. The decision under review cites *Nordlinger* and *Reinish*, which also cites *Nordlinger*. The underlying lynchpin of these decisions is that states are free to form a tax structure that favors the permanent home and its permanent homeowner residents and *Nordlinger* so stated the same rationale.

The trial court dismissed the Petitioners' Second Amended Complaint addressing each contention made, finding that the allegations of alleged invalidity failed to state a cause of action under the law. That decision only followed *Nordlinger*, and no new law was created as the Petitioners suggest. The Petitioners' sought-after "strict scrutiny" application test is without merit.

A. Equal Protection

The fundamental premises applicable in challenging the equal protection clause are stated in *Nordlinger* as follows:

> The appropriate standard of review is whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest. In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, see *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174, 179, 101 S.Ct. 453, 459, 461, 66 L.Ed.2d 368

> (1980), the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, see *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 724, 66 L.Ed.2d 659 (1981), and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, see *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S., at 446, 105 S.Ct., at 3257. This standard is especially deferential in the context of classifications made by complex tax laws. "[I]n structuring internal taxation schemes 'the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" *Williams v. Vermont*, 472 U.S. 14, 22, 105 S.Ct. 2465, 2471, 86 L.Ed.2d 11 (1985), quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351 (1973). See also *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 547, 103 S.Ct. 1997, 2002, 76 L.Ed.2d 129 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes").

112 S.Ct. at 2332. Thereafter, in addressing a contention by the petitioners therein it is stated:

> We have no difficulty in ascertaining at least two rational or reasonable considerations of difference or policy that justify denying petitioner the benefits of her neighbors'

> lower assessments. First, the State has a legitimate interest in local neighborhood preservation, continuity, and stability. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). The State therefore legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses, for example, in order to inhibit displacement of lower income families by the forces of gentrification or of established, "mom-and-pop" businesses by newer chain operations. By permitting older owners to pay progressively less in taxes than new owners of comparable property, the Article XIIIA assessment scheme rationally furthers this interest.

Nordlinger, 112 S.Ct. at 2333. Further, it is stated:

> Second, the State legitimately can conclude that a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner. The State may deny a new owner at the point of purchase the right to "lock in" to the same assessed value as is enjoyed by an existing owner of comparable property, because an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of a new owner at the point of purchase. A new owner has full information about the scope of future tax liability before acquiring the property, and if he thinks the future tax

> burden is too demanding, he can decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his purchase, does not have the option of deciding not to buy his home if taxes become prohibitively high. To meet his tax obligations, he might be forced to sell his home or to divert his income away from the purchase of food, clothing, and other necessities. In short, the State may decide that it is worse to have owned and lost, than never to have owned at all.

Id.

Florida courts have long recognized the importance of protecting homesteads in both tax matters and from forced sale for debt. *See* Art. X, § 4, Fla. Const.; *Osterndorf v. Turner*, 426 So.2d 539 (Fla. 1982); *Bigelow v. Dunphe*, 143 Fla. 603, 197 So. 328 (1940). The same or similar observations concerning the importance of the family and stability derived from permanent residents made in *Nordlinger* were acknowledged in this case and *Reinish*.

Although the Petitioners challenge only the SOHA and its implementing statute, they actually are challenging the whole Florida tax structure providing exemption to homestead property. Tax wise, all owners of second residential units are treated identically. A Florida resident owning a homestead property and a second vacation residential unit is treated exactly like the Petitioners and other non-residents who own residential units in Florida. It is

the use of the property that determines its taxable status.

B. Right to Travel

Petitioners' contention on this issue is totally without merit. The Petitioners seem to argue that others may not want to acquire residences and live in Florida. *Nordlinger* disposed of this issue by pointing out that a litigant could not raise another's legal rights. All persons can travel to and from Florida as they choose and rent or purchase property in Florida as selected. No right to travel is infringed on or inhibited. Moreover, as the economy and property values change, assessments on homestead and non-homestead property change also, up and down as has been the case since the economy recessed beginning in 2004-2005. The disparity in tax changes between homestead and non-homestead residential property.

C. Dormant Commerce

Petitioners' contention that the dormant commerce clause is somehow implicated is wholly without merit. Typically, dormant commerce clause implications arise in regulatory matters where the courts address the cumulative effect of a regulatory requirement or fee that might inhibit interstate commerce. *See American Trucking Ass'n, Inc. v. Michigan Public Service Comm'n*, 545 U.S. 429, 125 S.Ct. 2419 (2005); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076 (1977). Here, Florida tax is

imposed solely on property in Florida, and is paid by persons owning property in Florida. Non-residents choosing to own residential property in Florida, but having their permanent residence elsewhere than Florida, are treated exactly the same as Florida residents owning second or vacation homes in Florida and having their homestead exemption in Florida on a different residence. The property use determines its taxable status. *Reinish* followed *Brady* pointing out that local and interstate commerce are treated the same. Petitioners' contention that the SOHA "casts a pall" over the vacation home market benefitting residents to the disadvantage of non-residents is unsupported and does not exist. All persons similarly situated are treated the same. *Reinish* and *Nordlinger* rejected this contention and the trial court and appellate court in *Lanning* found the *Nordlinger* rationale sound. The trial court stated:

> The Court also concludes, as was held in *Reinish*, that the SOHA is an even-handed regulation that promotes the legitimate strong public interest in promoting the establishment and continuity of the primary and permanent home. The Court adopts the reasoning and finding stated in *Reinish* on this point. *Nordlinger* expressed a similar rationale. Accordingly, the allegations in Count I of plaintiffs' Second Amended Complaint of violations of the Commerce Clause, and more specifically what is referred to as the Dormant Commerce Clause are hereby dismissed with prejudice.

(Petitioners' Appendix B at 20) Thus, the decision in *Lanning* is wholly consistent with this Court's decision in *Nordlinger*. The petitioners' real dispute is with Florida's constitutional homestead tax exemption. Petitioners, as non-residents, want to be treated the same as Florida permanent residents.

No fact-intensive balancing test as mentioned in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970), was necessary or required, and the Petitioners' contention is without merit. The SOHA does not treat local and interstate commerce differently. A purchase of a second residence is treated the same whether purchased by a resident or non-resident. This is clearly different from the situation in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine,* 520 U.S. 564, 117 S.Ct. 1590 (1997), where non-profit summer camps with most campers coming from out of state were treated differently from similar non-profit camps serving primarily local Maine residents in qualifying for a Maine tax exemption. The court there concluded that the law discriminated against interstate commerce in that it expressly distinguished between entities that served mainly interstate clients from those that catered primarily to an intrastate market, in providing different tax treatment. That is not the situation at bar, since all residential properties used as second residences are treated the same regardless of ownership. The SOHA addresses legitimate local concerns and is not a protection measure. Since it is not discriminatory, and no undue burden was shown, no further fact

inquiry was necessary. The First District Court of Appeal's comment in *Reinish* relied on by the Petitioners as to the second part pointed out that the second part of the test involves "a much more flexible approach than the preliminary step." *Reinish*, 765 So.2d at 215. Petitioners have shown neither that the effects on interstate commerce are anything more than incidental or that the burden, if it exists at all, is clearly excessive when compared to the local benefits. No factual inquiry was necessary and the Petitioners are not entitled to a remand for same.

No burden exists on interstate commerce. Anyone can purchase a second residential property in Florida and be treated exactly like Florida residents doing the same thing. Moreover, the tax burden change on property value for all persons purchasing second residences is exactly the same. For the same reasons articulated herein under point A, the equal protection clause, Petitioners' assertion is totally without merit.

D. Privileges and Immunities

The Florida court held that no violation existed emphasizing that it was the use of the property that controlled the receipt of the tax benefit, and thus all those similarly situated were treated the same. No right to acquire residential Florida property or to travel to Florida to use it exists. Petitioners are free to enter and leave, purchase or not purchase as they choose, and will be treated like Florida residents.

E. Due Process

The trial court noted that the Petitioners cited no authority for the assertion pertaining to a right to be heard. Florida statutes provide a plain, speedy and adequate remedy. *See* § 194.171, Fla. Stat. (2010). Moreover, Petitioners need only pay the amount of taxes it admits to be due and owing, and payment of that amount automatically suspends collection until suit is resolved. No substantive due process exists. Florida taxes only property in Florida, and is not reaching out to extend its jurisdiction. Real property is not moveable.

F. 42 U.S.C. § 1983 Claim

For the same reasons stated previously herein relating to due process, this claim has no merit. Florida provides a plain, speedy and adequate remedy. *See National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 115 S.Ct. 2351 (1995).

CONCLUSION

Based on the foregoing this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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